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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, HOUSTON PORT BUREAU, INC., HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NUECES COUNTY NAVIGATION DISTRICT NO 1, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Appellants, City of Galveston and the Board of Trustees of the Galveston Wharves; Houston Port Bureau, Inc.;

Harris County-Houston Ship Channel Navigation District; Galveston Cotton Exchange and Board of Trade; Gulf Atlantic Warehouse Co.; and Manchester Terminal Corporation, plaintiffs in the court below, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented by the appeal are substantial.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Southern District of Texas, Houston Division, filed August 11, 1966, is reported at 257 F. Supp. 243, and is set forth as Appendix A hereto. (App., pp. 1-10) The judgment of the District Court dismissing the complaint is set forth as Appendix B hereto. (App., pp. 11-12) The report of the Interstate Commerce Commission is reported at 325 I.C.C. 400 and is reproduced as Appendix C hereto. (App., pp. 13-27) A copy of the Commission's order sought to be set aside appears within the Commission's report, 325 I.C.C. at 410. (App., p. 25)

JURISDICTION

This action was brought by appellants herein pursuant to the provisions of 28 U.S.C. sections 1336, 1398, 2284, and 2321-2325, inclusive, and 5 U.S.C. section 1009, to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission, entered May 7, 1965, in the Commission's Docket No. 34409, *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.*, The judgment of the District Court dismissing the complaint was filed August 11, 1966. Notice of appeal was filed by the appellants herein in the United States District Court for the Southern District of Texas on October 7, 1966.

Jurisdiction of the Supreme Court to review the judgment of the three-judge district court by direct appeal is conferred by 28 U.S.C. sections 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372 (1963); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. section 3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . locality, port, port district, . . . in any respect whatsoever; or to subject any particular person, . . . locality, port, port district, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. section 1007(b):

> All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . .

Section 10(e) of said Act, 5 U.S.C. section 1009(e):

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, . . . It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitation, . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 . . .

QUESTIONS PRESENTED

The Interstate Commerce Commission, acting on a complaint filed by the port of Corpus Christi, Tex., ordered that the rail rates on export cotton to Corpus Christi from origins in northern Texas, eastern New Mexico, and Oklahoma be equalized with the rates to Houston and Galveston, Tex., although the rail distances to Corpus Christi substantially exceed those to Houston and Galveston. In an action brought by appellants to set aside and annul the order, the three-judge District Court sustained the order and dismissed the complaint.

The following questions are presented by this appeal:

1. Whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act.

2. Whether the District Court erred by failing to make a distinction between what rail carriers may lawfully do voluntarily to meet competition and what the Commission may compel them to do.

3. Whether prior orders of the Commission requiring equalization of rates on export grain to the involved ports provide a rational basis for the order requiring equalization of the rates on export cotton.

4. Whether the Commission departed from statutory standards in order to advance a general policy of port equalization and whether such a policy is consistent with the Act.

5. Whether the District Court erred in sustaining the order on grounds not relied on by the Commission.

STATEMENT OF THE CASE

Upon complaint of the port of Corpus Christi, Division 2 of the Interstate Commerce Commission found, *inter alia*, that the rail rates on export cotton from certain origins in northern Texas, eastern New Mexico, and Oklahoma to Corpus Christi were not unreasonable in violation of section 1 of the Interstate Commerce Act, but found, by a 2-to-1 vote, that such rates were unduly prejudicial to Corpus Christi and unduly preferential of Houston and Galveston in violation of section 3(1) of said Act. Acting solely under section 3(1), the Commission ordered equalization of the rates. Upon denial of petitions for reconsideration filed by the railroads and the port interests of Houston and Galveston, the order became administratively final and appellants brought this action to set it aside. The three-judge court sustained the order and entered judgment dismissing the complaint. This appeal is taken from that judgment.

The Division did not make any finding that there was any misalignment in the assailed rates, relative transportation services considered (i.e. that the differences between the rates to Corpus Christi and those to Houston and Galveston were greater than justified by the differences in the services rendered) nor did it make any findings from which any such misalignment could be inferred. It recognized the greater rail distances to Corpus Christi, finding with respect to the distance relationships involved, (App., pp. 21, 23):

> The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galves-

> ton, the distance from each origin to Corpus Christi is longer than to the other two ports.
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> • • •
>
> . . . the docket No. 28300 distances . . . to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls.

Despite such differences in distances, the Division held that equalization of the rates should be required. The reasons given for this conclusion were that from origins stated to be "substantially the same" the Commission had previously required equalization of rates on export grain, and that the rates on export cotton "appear to exercise so drastic an influence as to require port equalization." (App., p. 23).

In the appendix to its report (App., pp. 26-27), the Commission set forth the rates and distances from representative shipping points to Corpus Christi, Galveston, and Houston. We have set forth in Appendix D hereto pertinent data from the Commission's appendix, to which we have added the Docket No. 28300 first-class rates, as shown by the record herein, as a recognized common denominator for testing whether rates in issue under section 3(1) are or are not misaligned.[1] (App., pp. 29-30) As Appendix D shows, except from relatively unimportant origins in Oklahoma, Corpus Christi now enjoys a more favorable rate relation on export cotton vis-a-vis Galveston and Houston than its distance relation warrants.

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[1]As an example of the Commission's conventional use of the Docket No. 28300 first-class rates as a test of lawful rate relations under section 3(1), see *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229, 245 (1962), order sustained in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359 (1963).

THE QUESTIONS ARE SUBSTANTIAL

Port relationship cases have traditionally been among the most important and most complex cases before the Commission. Not only is a vast amount of traffic at stake, for which there is bitter competition, but the decisions in such cases have an impact upon the economic fortunes of a large number of ports, railroads, and shippers. The Commission has had considerable difficulty in formulating orders in such cases which will pass the test of judicial review.[2] Much of the complexity in such cases, however, has been due to the fact that the applicable principles for determining what constitutes undue preference and prejudice have not been adequately spelled out by the Commission and the courts; and it has not been made sufficiently clear that the same principles for determining the existence *vel non* of preference and prejudice which apply in the case of any locality or shipper apply with equal force in port cases.[3]

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[2] *New York Central Railroad Co.* v. *United States,* 207 F. Supp. 483 (S.D. N.Y., 1962); *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830 (D. Mass., 1962) affirmed by an equally divided Court, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372 (1963); *Baltimore & Ohio Railroad Company* v. *United States,* 151 F. Supp. 258 (D. Md., 1957), judgment vacated on appeal on the ground that the District Court's judgment unduly restricted the Commission's consideration on remand, *Interstate Commerce Comm'n* v. *Baltimore & O. R. Co.,* 355 U.S. 175 (1957); *New York Central R. Co.* v. *United States,* 99 F. Supp. 394 (D. Mass., 1951), affirmed *per curiam, Interstate Commerce Comm'n* v. *New York Central R. Co.,* 342 U.S. 890 (1951).

[3] The Commission's difficulties in formulating and following proper principles in section 3(1) cases have not, of course, been confined to port cases, as is well illustrated by its latest report in *Stanislaus County* v. *Atchison, T. & S. F. Ry. Co.,* 329 I.C.C. 40, decided by the entire Commission, August 18, 1966. This was the Commission's

Since the questions here presented go to the essence of what constitutes preference and prejudice and what elements must be established to prove the offense, resolution of such questions will lay down applicable guidelines in all cases under section 3(1) where an allegedly prejudiced shipper, locality, or port seeks to compel changes in existing rates. Thus resolution of such issues is a matter of public importance with respect to the proper administration and interpretation of section 3(1) of the Act.

I.

A MISALIGNMENT OF RATES, RELATIVE TRANSPORTATION SERVICES CONSIDERED, IS AN ESSENTIAL ELEMENT OF UNDUE PREFERENCE AND PREJUDICE UNDER SECTION 3(1) OF THE ACT AND THE LACK OF A FINDING TO THAT EFFECT INVALIDATES THE ORDER.

The basic issue presented is whether, as contended by appellants, a misalignment of rates, relative transportation services considered, is an essential element of the undue preference and prejudice which is prohibited by section

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fourth report. Each of its three previous orders (302 I.C.C. 365; 315 I.C.C. 459; 323 I.C.C. 213) was set aside by the courts, either because the Commission failed to apply the proper principles of decision in such cases or because it failed to make necessary findings (193 F. Supp. 145; 236 F. Supp. 146; and a memorandum opinion in the United States District Court for the District of Minnesota, No. 3-65-7 Civil, May 18, 1965). The Commission has vacillated back and forth and, in its latest report, arrived at the conclusion that the Commission "is not empowered to remove disadvantages caused by natural environment," citing in support thereof *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 524, and *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42, 46. (329 I.C.C. at 53-54) That conclusion was directly contrary to its conclusion in the present case.

3(1) of the Interstate Commerce Act, or whether, as contended by appellees and held by the District Court, such undue preference and prejudice may be established merely by a showing that the allegedly prejudiced port is subjected to higher rates, even though due to longer hauls, and that such port is hurt by the difference in rates.

The District Court's decision proceeds upon a fundamental misconstruction of section 3(1) of the Act. What section 3(1) prohibits is inequity of treatment, not differences in rates. Congress did not prohibit the charging of higher rates where justified by greater service, even though the further distant person or locality might be hurt by such higher rates. Railroads are entitled to charge more for longer hauls than shorter hauls so long as their charges are not unfairly proportioned to the services rendered. Thus, a longer-haul port is not prejudiced by being charged higher rates than competing ports unless the difference in rates is greater than is warranted by the difference in services.

This Court held in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911), that the Interstate Commerce Act "does not attempt to equalize fortune, opportunities, or abilities." And, in *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 524 (1924), this Court said:

> . . . the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard.

Appellants believe those cases mean that charging a higher rate to a longer-haul port than to a shorter-haul port is not an illegal preference of the shorter-haul port

unless the difference in rates is more than is justified by the difference in the services rendered. If that is correct, the Commission is without power to compel equalization of rates for the purpose of neutralizing the advantages and disadvantages of location of such ports.

The necessary corollary of the construction this Court has given section 3(1) is that a misalignment of rates, relative transportation services considered, is an essential element of a section 3(1) violation so that an order compelling equalization cannot stand in the absence of a quasi-jurisdictional finding that there is a misalignment in the existing rates, relative transportation services considered.[4] In the absence of such a misalignment there can be no prejudice in the rates, undue or otherwise. Obviously, there can be no "undue" prejudice in the absence of some prejudice to be undue.[5]

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[4] The District Court concedes that there must be a "showing" of "a rate disparity or 'misalignment of rates,'" citing *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 363 (N.D. Ill., 1963), but then it simply equates those terms with a mere "difference" in rates. The District Court either overlooked or disregarded the fact that, in the cited case, no one disputed the existence of a disparity or misalignment of rates, *relative transportation services considered*, which had been established by comparing such rates to the Docket No. 28300 first-class rates, as well as rail costs, as common-denominator tests of the services rendered. (218 F. Supp. at 362) The dispute in the cited case was over the question of "injury," another, but wholly separate, essential element of a showing of undue preference and prejudice.

[5] See Sharfman, *The Interstate Commerce Commission* (1936), vol. III-B, pp. 554-559. Professor Sharfman points out that two separate inquiries are involved in determining what constitutes unlawful preference and prejudice: (1) by what tests is a preferential or prejudicial relationship to be known, and (2) on what grounds

While the Commission has not made this distinction so clearly as did Professor Sharfman, it has recognized that rates which properly reflect differences in distance afford no basis for a finding of undue prejudice against a person or locality with the longer haul. In *Grain From Groups I and J Origins to Pacific Coast*, 299 I.C.C. 129, 134 (1956), the Commission said:

> However, the respondents have shown that the proposed rates are reasonably graded according to short-line distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue. (Emphasis added)

And in *Paper From the South and Southwest*, 218 I.C.C. 202, 216 (1936) the Commission said:

> . . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations.

The reason why, in such cases, "no basis exists for a finding of prejudice which is undue" is, of course, because no basis exists for a finding of any prejudice at all. Obviously there is no prejudice against a longer-haul locality if it is ac-

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may such a relationship be deemed free from the prohibitions of the statute? After discussing the relevant considerations, he says (pp. 558-559):

> The test of preference or prejudice does not lie, then, in the elementary circumstance of whether rates are equal or unequal. The equality designed to be produced by equal rates, where unequal transportation services are involved, is the commercial equality of differently situated shippers—a consideration by which the Commission may not legally and should not economically be governed.

corded a level of rates no higher, distance considered, than the shorter-haul competing locality is accorded.[6]

In "non-port" cases, the Commission purports to follow the rule of the *Diffenbaugh* and *Illinois Central* cases that it may not compel a change in rates for the purpose of neutralizing the advantages and disadvantages of location.[7] Furthermore, for many years it followed the same rule in "port" cases. In *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C. Rep. 612 (1898), where New York port interests sought to compel equalization of rates on grain and produce to the longer-haul port of New York with rates to the shorter-haul ports of Philadelphia and Baltimore, the Commission, in holding that the assailed rates did not violate section 3(1), said (p. 667):

> Distance is frequently disregarded by carriers in the making of their rates. The Commission has held that it may be under some circumstances properly disregarded to some extent. It has been repeatedly said, however, that distance ought, when possible, to be regarded, and we have never held that a carrier would

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[6] "Distance is the commonly accepted measure of relative transportation service, conditions affecting transportation being substantially the same." *Apples and Pears from Oregon and Washington*, 181 I.C.C. 579, 591 (1932). In the present case, the Commission found that such transportation conditions "are substantially the same." (App., p. 23)

[7] For example, *Stanislaus County* v. *Atchison, T. & S. F. Ry. Co.*, 329 I.C.C. 40, 53-54 (1966); *Grand Rapids Gypsum Co.* v. *Ann Arbor R. Co.*, 321 I.C.C. 293, 296 (1963); *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R. Co.*, 315 I.C.C. 555, 558 (1962); *Grain From Groups I and J Origins to Pacific Coast*, 299 I.C.C. 129, 136 (1956); *International Minerals & Metals Corp.* v. *Southern Pac. Co.*, 279 I.C.C. 617, 619 (1950); *California Cold Storage & Distr. Co.* v. *A., T.& S.F. Ry. Co.*, 284 I.C.C. 326, 328 (1952).

be compelled to disregard it for the purpose of putting two communities upon a commercial equality.

In accord are *Chamber of Commerce of N. Y.* v. *N.Y.C. & H.R.R.R. Co.*, 24 I.C.C. 55 (1912); *Maritime Asso., Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539 (1925); *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929). In the case last cited, the Commission specifically considered whether Corpus Christi was entitled to compel the rail carriers to disregard the differences in distance and equalize the rates on export cotton to Corpus Christi with those to Galveston and Houston. It was there held that, in view of differences in distance almost exactly the same as in the present case, such equalization could not be compelled.[8] (155 I.C.C. at 715-717).

There is nothing in the Commission's report to explain its departure from the rule of the *Diffenbaugh* and *Illinois Central* cases or its own section 3(1) cases, both "port" and "non-port" cases. Cf. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954). Those cases must govern this case and the District Court erred in holding otherwise. The District Court's definition of prejudice (App., p. 6) as "a practical consequence in the practical world of transportation," would leave the determination of what constitutes undue preference and prejudice to the complete and arbitrary discretion of the Commission, and with no standards to be followed in the determination of that issue. We submit that the District Court erred and that the words "undue preference and prejudice" set forth a legal standard which must get its

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[8] The District Court brushed aside that decision (note 8, App., p. 9) with the comment: "Much has happened since then." But there is not a single word in its opinion to indicate what it thought had happened to change the situation. The District Court declined to face up to the fact that what the Commission there considered to be controlling were the differences in distance.

final meaning from judicial construction. Cf. *Federal Trade Comm'n* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). When this Court holds that the advantage of location is not an illegal preference, and that the Act does not attempt to equalize fortune, opportunities, or abilities, those are legal standards which the Commission must respect. It cannot be allowed to circumvent them on the theory that it has "broad discretion" to determine what is prejudice as a "practical consequence in the practical world of transportation."

In holding (App., pp. 9-10) that the Commission's "ultimate conclusion was well within its 'broad discretion . . . to accommodate the factors of transportation conditions, distance and competition,' " the District Court misconceived the issue and misunderstood the Commission's role in cases of this kind. This was due to its failure to recognize the distinction so well pointed out by Professor Sharfman (note 5, pp. 10-11 *supra*) between the two inquiries: (1) by what tests is a preferential and prejudicial relationship to be known, and (2) on what grounds may such a relationship be deemed free from the prohibitions of the statute. The present case raises an inquiry of the first category: Did the Commission apply the proper test of what is a preferential and prejudicial relation? But the rule applied by the District Court is the one applicable to inquiries of the second category: Where such a preferential and prejudicial relationship exists, is it justified by competition or other transportation conditions?[9] The issue here is not whether port equalization would be lawful but whether the

[9] The importance of such a distinction is well illustrated by the difference between the issues which are raised in cases such as the present one, where a longer-haul port seeks to require changes in existing rates in order to *compel* port equalization in disregard of substantial differences in distances, and cases in which the carriers vol-

existing rates are unlawful. Cf. *Boston and Maine Railroad* v. *United States*, 202 F. Supp. at 837. Recognition of that distinction is of the utmost importance and the failure of the District Court to observe it is a fundamental error which caused the District Court to err in the other respects herein pointed out.

We submit, therefore, that whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice is a substantial question of public importance.

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untarily seek to disregard substantial differences in distance in order to *voluntarily* equalize competing ports. In the latter type of case, of which *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709 (1962), 319 I.C.C. 620 (1963) and *Boston and Maine Railroad* v. *United States*, 202 F. Supp. 830 (1962), affirmed by an equally divided Court, *Baltimore & O.R. Co.* v. *Boston & M.R. Co.*, 373 U.S. 372 (1963) are typical examples, a misalignment of rates is *always* present simply by reason of the fact that the carriers propose to charge equal rates for unequal services. Where there is such a misalignment between competing ports, the tests of prejudice have been thus met, and the inquiry in such cases is *always* whether such prejudice is "undue" within the meaning of the statute. It is in considering this inquiry that the Commission has broad discretion to accommodate the factors of distance, competition, and other transportation conditions, for it is well recognized that not all prejudice is unlawful, but only such prejudice as is "undue." In such a case the lawfulness of existing rates is not in issue; only the lawfulness of the proposed rates is in issue. *Boston and Maine Railroad* v. *United States, supra*, 202 F. Supp. at 837. In cases such as the present one, however, where the lawfulness of existing rates is in issue, the first inquiry must *always* be: Is there any misalignment in the rates? In the absence of an affirmative answer to that inquiry, the other inquiries are never reached. The area of the Commission's broad discretion to accommodate the factors of distance, competition, and other transportation conditions—the area of determining whether prejudice is or is not undue—is not reached until the prejudice itself is established.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT PRIOR ORDERS OF THE COMMISSION REQUIRING EQUALIZATION OF EXPORT RATES ON GRAIN TO CORPUS CHRISTI, GALVESTON AND HOUSTON PROVIDE A RATIONAL BASIS FOR THE ORDER REQUIRING EQUALIZATION OF THE EXPORT RATES ON COTTON TO THOSE PORTS.

The Commission based its order here primarily on three previous cases in which it required equalization of rates on export grain and grain products to Corpus Christi with those to Galveston and Houston (App., p. 23).[10] The District Court held (note 6, App., p. 8) that those cases "are cited because of their role as transportation conditions and not as legal authority for the order under consideration"; and that "prior equalization of rates from these origins for other commodities is a relevant transportation condition." (App., p. 9) The District Court's theory that the prior decisions were "relevant transportation conditions" was entirely its own. This theory was not articulated by the Commission.[11]

Even if this novel theory of the District Court were correct, it would not support the order here for the cases cited do not, and cannot, supply the missing finding, which must be based on facts of record here, that there is a misalignment, relative transportation services considered, in the assailed rates on export cotton. In the absence of a finding of such misalignment, neither the Commission nor the Court has any occasion to consider whether a non-existent

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[10] *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963).

[11] See pp. 21-25, *infra*.

misalignment would be justified by transportation conditions.

Furthermore, the District Court erred in holding that the prior cases were relevant transportation conditions here. There is nothing in the Commission's report which shows that the transportation circumstances and conditions surrounding the movement of export grain and grain products are in any way similar to those surrounding the movement of export cotton. On the contrary, numerous substantial differences are readily apparent.[12] The adequacy of facts to support the Commission's conclusion must be established by findings based on the record in this case. The Commission cannot rely on its findings in other cases to take the place of essential findings and substantial evidence here. *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652 (1954); *Erie R. Co.* v. *United States,* 59 F. Supp. 748 (S.D. Ohio, 1944).

Resolution of this question is important to the administration of section 3(1) because it is necessary to ensure that the determination of what constitutes undue prefer-

[12] For example, the origins here involved are in northern Texas, eastern New Mexico, and Oklahoma. In *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.,* 291 I.C.C. 459 (1954), the first of the export grain cases referred to, and the one on which the other two export grain cases were primarily based, the involved origins were in Colorado, Kansas, Missouri, Illinois, Iowa, Nebraska, South Dakota, North Dakota, Minnesota, and Wisconsin. 291 I.C.C. at 459-460. In addition, in that case, as distinguished from the present one, there was extensive voluntary equalization of rates by the railroads to Galveston, Houston, Port Arthur, New Orleans, Mobile, and Pensacola, but Corpus Christi had been excluded from the equalization, although the distances to Corpus Christi were generally comparable to the distances to New Orleans, Pensacola, and Mobile, which enjoyed rate equalization with the other Texas ports. 291 I.C.C. at 463-464.

ence and prejudice among ports will be based on the facts of record and will not be determined as a "policy" question.[13]

III.

THE COMMISSION DEPARTED FROM STATUTORY STANDARDS TO ADVANCE A GENERAL POLICY OF PORT EQUALIZATION WHICH IS CONTRARY TO SECTION 3(1) OF THE ACT.

The District Court found (App., p. 5) that the Commission "did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports." This finding is clearly incorrect. The Commission's order departs from the guidelines laid down by this Court in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42 (1911) and *United States* v. *Illinois Central R. R.*, 263 U.S. 515 (1924), from the Commission's own prior decisions in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C. Rep. 612 (1898), *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R.R. R. Co.*, 24 I.C.C. 55 (1912), *Maritime Asso., Boston Chamber of Commerce*, v. *A.A.R.R. Co.*, 95 I.C.C. 539 (1925), *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929), and from numerous non-port cases involving the same principles.[14]

The Commission's report does not contain any explanation of why it did not follow such principles here. Since the Commission still purports to follow such principles in "non-port" cases the only reasonably logical explanation of why it did not do so here is because it erroneously believes that the 1935 amendment which added "port" and

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[13] See pp. 18-21.

[14] See note 7, p. 12.

"port district" to section 3(1) of the Act, 49 Stat. 607, somehow changed the rules for determining preference and prejudice among ports and authorizes the Commission to follow a general policy of port equalization.

While the Commission did not specifically refer to such policy here, it has acknowledged the existence of such a policy. In *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709, 725 (1962), Division 2 said:

> The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public.

The Commission's finding in the present case (App., p. 23) that the assailed rates "appear to exercise so drastic an influence as to require port equalization," and its reliance on the prior grain cases, without any discussion of the facts in those cases, as authority for such equalization clearly indicate that "policy" considerations were what dictated the order here in question. Furthermore, the Commission specifically defended the order in the District Court on the ground that it was in accord with such policy, saying (Gov't Br., p. 25):

> . . . plaintiffs . . . contend that there can be no preference and prejudice if two competing ports are accorded the same *level* of rates, distance considered. If this were so, the historical common practice of requiring rate equalization for competing ports despite differences in distance would be unlawful and would never have occurred. [Citing and quoting from *City of Wilmington, supra,* as being to the contrary.]

City of Wilmington was, as we have indicated (note 9, pp. 14-15) a case of an attack by a shorter-haul port on the equalization voluntarily extended by the carriers to a longer-haul port. Whether, or to what extent, the Commission may follow a "policy" of *permitting* port equalization to be maintained in disregard of differences in distance is a question which is not involved here. Here the question is not whether equalization would be lawful, but whether the *existing* rates are unlawful so that equalization may be compelled. *City of Wilmington* has no bearing on that question.

The Commission has suggested that the 1935 amendment was an expression of Congressional policy in favor of port equalization. *E.g., Brazos River Harbor Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54, 65-66 (1963), 322 I.C.C. 529, 534-535 (1964), which decision was also relied on heavily in support of the order in the District Court (Gov't Br., pp. 20-21); and *Alabama State Docks Dept.* v. *Alabama T. & N. R. Co.*, 323 I.C.C. 185, 188-189 (1964). To the contrary, the legislative history of the amendment indicates that its purpose was to restore to ports the forum to complain of undue preference and prejudice which had been denied them by this Court's decision in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933) holding that a port was not a "locality" within the meaning of that term as it appeared in section 3(1) as it then read. The legislative history contains no indication that there was to be any change in the guidelines for determining preference and prejudice. In fact, the specific situation which brought forth the amendment was one in which the carriers were attempting to deprive the shorter-haul ports of the benefit of their location by voluntarily equalizing rates to longer-haul ports in disregard of very substantial differences in distance. It was in such a situation that Congress acted to restore to the shorter-haul ports the right to complain of such treatment.

While this Court has never passed on the meaning of the 1935 amendment, it has held that a similar amendment, made in 1940, which added to section 3(1) the words "region, district, territory," "did not introduce a new standard of discrimination" into section 3(1). *New York* v. *United States,* 331 U.S. 284, 300 (1947). And, in *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830 (D. Mass., 1962), affirmed by this Court by an equally divided vote, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372 (1963), it was held (202 F. Supp. at 836) that "Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting preference and prejudice or any special treatment of ports and port districts was intended."

It is important to the administration of section 3(1) that this Court make clear that questions of preference and prejudice among ports are to be decided on the facts of record and not as policy matters; and it is important that this Court make it clear that the 1935 amendment did not change any of the prevailing rules respecting undue preference and prejudice or indicate that any special treatment of ports and port districts was intended.

IV.

THE DISTRICT COURT ERRED IN SUSTAINING THE ORDER ON GROUNDS NOT RELIED ON BY THE COMMISSION.

The decisions of this Court make it clear that the validity of the Commission's order must be tested on the grounds on which the Commission itself acted, and that the Commission must articulate those grounds with precision. The reviewing court may neither adopt the *post hoc* rationalization of Commission counsel or supply its own rationale in place of the one articulated by the Commission. *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80,

94-95 (1943); 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962); *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-444 (1965).

The rule of law is so clear that, if this question alone were presented, it would not require further argument or plenary consideration, although because of the substantial and obvious error of the District Court, summary reversal of its judgment would be required. The importance of this question lies in the fact that, when the District Court's rationalization of the order is stripped away, it can be seen that the Commission's ultimate conclusion of undue preference and prejudice is an arbitrary pronouncement with no pretense of conformity to the criteria of undue preference or prejudice set forth in the opinions of this Court.

The District Court found that the Commission's findings are "sketchy and present this court with difficulties which more explicit findings would remove" and that the Commission's opinion "is so imprecise in revealing just what findings it is making that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders." (App., pp. 3-4). It also recognized that "the United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration." (App., p. 4). Having so found, the District Court then, contrary to its own ruling, specifically relied on those "new rationales" as its own reasons why the order should be sustained.

Among the principal reasons given by the District Court for sustaining the order were the following:[15]

[15] Numbers in parentheses added to facilitate identification.

(1) It [Corpus Christi] is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, ... (App., p. 6)

• • •

(2) Corpus Christi now gets practically no cotton from these origins by truck. (App., p. 6)

• • •

(3) The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. (App., pp. 7-8).

• • •

(4) Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily . . . (App., p. 8)

• • •

(5) The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul. (App., p. 9).

• • •

(6) The prior equalization of rates from these origins for other commodities is a relevant transportation condition. (App., p. 9).

Except to the extent that No. 6 above refers to the equalization on grain and grain products ordered by the Commission (referred to in the omitted portion of No. 4 above), a subject discussed at pp. 16-18, *supra*, not a single one

of the foregoing reasons given by the District Court for sustaining the order was given by the Commission as a reason for entering it. They are all "new rationales" offered by counsel for the Government and intervening defendants or supplied by the District Court itself in support of the order. Furthermore, they are in substantial part either factually incorrect or are irrelevant to the issues here, and even if they had been relied on by the Commission, they would not support the order.[16]

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[16] For example, as to No. 1, the Commission's report makes no reference to highway mileages. As to No. 2, the report shows that "during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck." (App., p. 18) As to No. 3, the so-called "equalization"—which is not even referred to in the Commission's report—resulted from the fact that the mileage scales of "any-quantity" rates on cotton then in effect provided a blanket rate to all Texas ports for distances in excess of 210 miles. Such rates were replaced by carload rates in the early 1930's and the "equalization" referred to has not been in effect for more than 30 years. Insofar as Nos. 4 and 6 refer to voluntary equalization on other commodities, they are based on a misunderstanding of the facts, as there is no such equalization and the Commission's report does not say that there is. While the same *scales* of rates apply to Corpus Christi as to Galveston and Houston, the rates are higher to Corpus Christi because of the longer distances. As to No. 5, the Commission gave no such reason for its order although the basic figures do appear in the report in another form. Furthermore, the District Court's rationalization gives the wrong impression. The short-line distance from Lubbock to Corpus Christi exceeds that to Galveston by 67 miles, not 22 miles as the District Court seems to suggest, and exceeds the short-line distance to Houston by 112 miles. But the Docket No. 28300 mileages were the ones on which the Commission relied as fixing the involved distance relationships. The Docket No. 28300 mileage from Lubbock to Corpus Christi is 121 miles greater than to Houston and Galveston, which are in the same class-rate group. (App., p. 22)

It is apparent that the District Court did not properly discharge its duty under the Administrative Procedure Act. It did not analyze the findings made by the Commission to determine if they articulated a rational basis for the order. It simply started from its conclusion that it is wholly within the "broad discretion" of the Commission to decide what is undue preference as "a practical consequence in the practical world of transportation," and then set about to rationalize its conclusion, failing to notice that the reasons it was giving for sustaining the order were not those relied on by the Commission in entering the order, but were the *post hoc* rationalizations of counsel for the Government and the intervening defendants.

Were it not for the fact that the other questions here presented require the plenary consideration of this Court, the judgment of the District Court should be summarily reversed, because of its failure to follow the rule of the *Chenery, Burlington Truck Lines* and *Metropolitan Ins.* cases, with instructions to set the Commission's order aside and remand it to the Commission for further consideration. Under the circumstances, however, that would unduly delay resolution by this Court of the important legal issues here presented relating to the proper interpretation of section 3(1) of the Interstate Commerce Act and the Commission's power thereunder.

CONCLUSION

For the reasons above set forth, we submit that the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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December 1966

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF GALVESTON, ET AL., *Plaintiffs,*		
VS.		Civil Action
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*		No. 65-H-594

Before BROWN, *Circuit Judge,* and HANNAY and INGRAHAM *District Judges.*

INGRAHAM, *District Judge:*

The ports of Houston and Galveston and four of the original twenty-six defendant railroads seek to set aside an order of the Interstate Commerce Commission entered in *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.,* 325 I.C.C. 400 (1965). The order held that the export rates for cotton from specified origins in northern Texas, Oklahoma and New Mexico were unduly prejudicial to the port of Corpus Christi and unduly preferential to the ports of Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1).[1]

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[1] Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port

This court concludes that the order is supported by substantial evidence, is consistent with Section 3(1), and meets the requirements of the Administrative Procedure Act, 5 U.S.C.A., Section 1001, *et seq.* This court enforces the order by denying relief and dismissing the cause on its merits.

This court properly performs only a very limited role in reviewing a decision of an administrative body such as the ICC. Once a rational basis for the conclusions of an administrative body is found, the judicial function is ended. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-7 (1934). Courts are not empowered to weigh the wisdom of a particular decision:

> "It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946).

Courts have long recognized the application of this principle to discriminatory rail rate situations and pointed to the particular considerations which support the rule in this area. Whether a discrimination or preference is undue, unreasonable and unjust is a determination for the

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district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

ICC to make. *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923). A court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry.* v. *United States,* 272 U.S. 658, 665-6 (1926). Congress has constituted the ICC as the expert body which is informed by experience to determine whether undue discriminations exist in rail rates.

> "The complexities and involvements of railroad rates are not to be shifted from the shoulders of the experts commissioned to handle them to the backs of the judiciary; nor are the broad powers of judgment conferred upon the experts to be unduly hampered." *Koppers Company, Inc.* v. *United States,* 166 F.Supp. 96, 103 (W.D. Pa. 1958).

This court must determine whether the Commission has followed correct legal procedures and principles, but beyond that this court is permitted no greater role than ascertaining whether there exists a rational basis for the ICC order.

> " . . . We would depart from our competence and our limited function in their field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. This is a task peculiarly for it." *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 593 (1949).

The ICC findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The ICC opinion is so imprecise in revealing just what findings it is making that the order

borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.[2]

However, this court concludes that the findings are adequate under Section 8(b) of the Administrative Procedure Act, 5 U.S.C.A., Section 1007(b). No purpose would be accomplished by returning the case to the ICC for further findings.

The ICC decision here must be tested on the basis of what it contains, and not on any new ideas offered to support it. The United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration. *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 94-5 (1943).

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[2] "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Com.* v. *RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under Sec. 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare id. 346 U.S. at 91. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp* v. *NLRB*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-8 (1962).

However, plaintiffs have repeatedly insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This court deems that the ICC was aware of what it was doing and intended the result it achieved. It did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports. New or improved findings would not serve to articulate the process of decision and expose the factual weaknesses.

The order stands or falls on the sufficiency of the findings made and the evidence to support them.

Before the ICC can equalize rates, there must be an adequate factual showing of (a) prejudice, and (b) prejudice which is undue resulting from a rate disparity or "misalignment of rates". *Atchison, T. & S. F. Ry.* v. *United States*, 218 F.Supp. 359, 363 (N.D. Ill., 1963). Plaintiffs assert that to make an initial showing of prejudice, rates to the more distant port must be shown to be higher *relative mileage considered* than those to the nearer port. If the rates *per mile* are not higher to the more distant port, plaintiffs claim that there is no showing of prejudice.[8]

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[8] Plaintiffs' claim is based on general language found in two ICC decisions:

> "However, the respondents have shown that the proposed rates are reasonably graded according to shortline distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue." (Emphasis supplied). *Grain from Groups I & J Origins to Pacific Coast*, 299 ICC 129, 134 (1956).

This court squarely rejects this mechanical definition of prejudice. Prejudice is a practical consequence in the practical world of transportation. That Corpus Christi is prejudiced is established by uncontradicted testimony in the record. Corpus Christi has ample shipping facilities and liner services. It is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, yet Corpus Christi cannot get a single bale of cotton by rail for export.[4] Corpus Christi now gets practically no cotton from these origins by truck.[5] This result is a direct consequence of the rail rate structure. Shippers decline to ship cotton to Corpus Christi simply because it costs about 25¢ per bale more than does shipping to Houston-Galveston. Per mile or "distance considered" rates do not figure in their calculations.

". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations." *Paper from the South and Southwest*, 218 ICC 202, 216 (1936).

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[4] Since the issue is prejudice regarding cotton from these origins, the fact that Corpus Christi does get cotton from the Rio Grande Valley area of Texas has no bearing other than to demonstrate that Corpus Christi is a cotton port and can claim a right to compete for cotton from the origins in this case.

[5] Under a "truck allowance system" instituted by the railroads, rail rates are now lower to Houston-Galveston than the truck rates to Corpus Christi. However, on February 23, 1966, Division 2 of the ICC found the allowance system to be unlawful. *Allowances for Trucking Baled Cotton, Ark., Okla., Tex.*, 326 ICC 335 (1966).

If this result flows from the natural advantage and location of Houston-Galveston and the natural disadvantage of Corpus Christi in relation to them, then the ICC lacks authority to equalize the rail rates. "The law does not attempt to equalize fortune, opportunities, or abilities." *I.C.C.* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911). " . . . the natural advantage which belongs to a locality does not constitute a preference." *Baltimore & O. R.R.* v. *United States*, 151 F.Supp. 258, 275 (D.Md., 1957).

However, there is more to natural advantage and location than geographic mileage differences, and shorter mileage to one port does not automatically give immunity from rate equalization.

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46) and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924).

While mileage is important, the "transportation standard" includes other transportation conditions. *Boston & M. R.R.* v. *United States*, 202 F.Supp. 830 (D.Mass., 1962), aff'd 373 U.S. 372 (1963), 374 U.S. 859 (1963); *Atchison, T. & S. F. Ry.* v. *United States*, 231 F.Supp. 422, 430 (N.D. Ill., 1964); *City of Wilmington* v. *Alabama G. S. Ry.*, 316 ICC 709, 724-5 (1962). The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been

equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily and some by order of the ICC.[6] The ICC found that "The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston." (325 ICC 406). The ICC conclusion that Corpus Christi's disadvantage amounts to undue prejudice was clearly stated: "Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi." (325 ICC 408).

The question of mileage is not a simple one, as the ICC emphasized. The examiner preferred percentage comparisons of short-line distances from 19 selected origins which gave an average difference of 14%. The Corpus Christi interest urged a weighted average which produced smaller variations.[7] The ICC considered the docket No. 28300 distances urged by Galveston interests which showed variations of 120 to 160 miles, or 20% on longer hauls and

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[6] These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration: *Export Grain from Texas to Texas Points*, 319 ICC 16 (1963); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry.*, 315 ICC 155 (1961); *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.*, 291 ICC 459 (1954).

[7]

Origin	*Galveston*	*Corpus Christi*	*Difference*
New Mexico	796	811	15
Oklahoma	516	613	97
Texas	581	648	67

Houston is 45 miles closer to these origins than Galveston.

60% on shorter hauls. The ICC did not reject the other standards, but emphasized docket No. 28300 distances to give consideration to the greatest mileage differences presented. Using these computations which showed the greatest mileage variations, the ICC made two findings:

> (1) "In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances." (325 ICC 408).
>
> (2) "Such ranges in distance have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required." (325 ICC 408).

The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul.

The prior equalization of rates from these origins for other commodities is a relevant transportation condition. The ICC concluded that "no different conclusion is warranted in the instant proceedings." (325 ICC 408). This court cannot say that this decision was without a rational basis.[8]

Considering the record and findings as a whole, this court concludes that the ICC gave due consideration to the distance factor, and that its ultimate conclusion was well within its "broad discretion . . . to accommodate the

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[8] Nor is the decision precluded by the ICC's refusal to grant cotton equalization from these origins in 1929. Much has happened since then. *Nueces County Nav. Dist.* v. *Abilene & S. F. Ry.*, 155 ICC 712 (1929).

factors of transportation conditions, distance and competition." *Ayrshire Collieries Corp.* v. *United States, supra,* at 593.

It is therefore the opinion of this court that the ICC order should be enforced and the complaints dismissed.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF GALVESTON, ET AL., *Plaintiffs,* vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 65-H-594

JUDGMENT

I. For the reasons set out in the court's opinion of this date, it is

ORDERED, ADJUDGED AND DECREED

that the order of the Interstate Commerce Commission served on May 19, 1965, in the case of *Nueces County Navigation District No. 1* v. *Atchison, Topeka, and Santa Fe Railway Company, et al.*, 325 I.C.C. 400, be enforced and that the complaints of plaintiffs in this action be dismissed.

II. However, this court further believes that the temporary restraining order entered by this court on October 1, 1965 (as authorized by 28 U.S.C.A., Section 2324) should be extended through the disposition of appeal of this decision. Rule 62(c), Federal Rules of Civil Procedure; *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501 (1931). Implementation of the ICC order will require the cost of compiling, printing, and mailing new tariffs and will result in a loss of business to the plaintiff railroads

whose lines do not reach Corpus Christi. This court, viewing all the circumstances presented, believes that the changes required by the ICC order and the resulting irreparable damage to plaintiffs should not be instituted until the legality of the order is finally determined by the Supreme Court. Congress has provided an appeal of right to the Supreme Court from this court's decision. 28 U.S.C.A., Section 1253. Should no appeal be taken, the restraining order will cease.

Therefore, this judgment is stayed and shall not take effect until any appeal taken to the Supreme Court is finally determined, or, in the event no appeal is taken, this stay shall cease and this judgment shall become effective sixty days after this date.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

APPENDIX C

Served May 19, 1965

30266

INTERSTATE COMMERCE COMMISSION

No. 34409[1]

NUECES COUNTY NAVIGATION DISTRICT NO. 1 v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Decided May 7, 1965

Assailed export rates on cotton, in carloads, from certain points in Oklahoma, New Mexico, and Texas to Corpus Christi, Tex., found to be unduly prejudicial to Corpus Christi and unduly preferential of other Texas ports. Undue preference and prejudice ordered removed.

J. F. Jamison, Jr., Frank A. Leffingwell, and *Robert B. Reedy* for complainants.

Charles W. Bucy, Elmo F. Clark, Joseph E. Quin, and *Clarence H. Williams* for the Secretary of Agriculture of the United States.

M. P. Hamby for intervener in support of complainants.

Edwin N. Bell, John P. Ganly, Harvey Houston, Y. E. Juge, Don McDevitt, Milton E. Nelson, Jr., Sterling W. Steves, Thomas A. Stoery, and *William A. Thie* for defendants.

J. W. Boehl, L. F. Daspit, W. E. Fincher, E. B. McKinney, Carl S. Parker, Jr., and *Louis A. Schwartz* for interveners in support of defendants.

[1] This report embraces also No. 34409 (Sub-No. 1), Gulf Compress v. Atchison, Topeka & Santa Fe Railway Company et al.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND TIERNEY

GOFF, *Commissioner:*

These proceedings present related issues, were heard on a consolidated record, and will be disposed of in one report. Exceptions to the recommended report and order of the examiner, and replies thereto, were filed by the parties and certain of the interveners. Our conclusions differ, in part, from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the title proceeding, by complaint filed on March 12, 1964, the complainant, a political subdivision of the State of Texas which owns and operates port terminal facilities at Corpus Christi, Nueces County, Tex., alleges that the carload rates[2] maintained by the defendants[3] on export cotton from points in Texas on and north of the line of the Texas and Pacific Railway Company between El Paso, Tex., and Shreveport, La., from points in New Mexico on and east of a line of the Santa Fe railway system between El Paso and Trinidad, Colo., and from points in Oklahoma, to the port

[2] Rates and differences in rates are stated per 100 pounds.

[3] The Atchison, Topeka and Santa Fe Railway Company; Beaver, Meade and Englewood Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; The Louisiana and North West Railroad Company; Louisiana Midland Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Oklahoma City-Ada-Atoka Railway Company; Panhandle and Santa Fe Railway Company; Quanah, Acme & Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas Mexican Railway Company; The Pecos Valley Southern Railway Company; Roscoe, Snyder and Pacific Railway Company; The Texas and Pacific Railway Company; and Texas-New Mexico Railway Company.

of Corpus Christi are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and are unduly prejudicial to the port of Corpus Christi and unduly preferential of the ports of Galveston and Houston, Tex., and New Orleans, La., in violation of section 3(1) of the act. In No. 34409 (Sub-No. 1), a complaint was filed on March 23, 1964, by the Plains Cotton Cooperative Association, a cooperative cotton marketing association with headquarters at Lubbock, Tex.,[4] and the Gulf Compress, a cooperative corporation with a cotton compress and warehouse facility at Corpus Christi, alleging that the carload rates maintained by defendants[5] on cotton for export from the above-described origin territory to Corpus Christi are unjust and unreasonable, and unduly prejudicial to them and unduly preferential of competitors and other western gulf ports, including Houston and Galveston, and in some instances New Orleans. We are asked to issue a cease and desist order and to prescribe just, reasonable, and otherwise lawful rates, rules, regulations, and charges for the future.

The Secretary of Agriculture of the United States, the Brownsville Navigation District of Cameron County, Tex., and the Lubbock Cotton Exchange intervened in support of the complainants, and the board of trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, The New Orleans Traffic and Transportation Bureau, and the Houston Port Bureau, Inc., intervened in support of the defendants.

The complainants seek rates and related provisions on export shipments of cotton from the considered origins to

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[4] By order dated May 1, 1964, the Plains Cotton Cooperative Association was dismissed as party complainant, and this proceeding was then entitled Gulf Compress v. The Atchison, Topeka and Santa Fe Railway Company, et al.

[5] The defendants are listed in footnote 3 and, in addition, Hollis & Eastern Railroad Company.

Corpus Christi, the same as are maintained by the defendants on similar traffic to other western gulf ports, principally Houston, Galveston, and New Orleans. The ocean rates from Galveston, Houston, and Corpus Christi are the same. After the evidence was submitted, four of the defendants, namely, the Pecos Valley Southern, the Roscoe, Snyder & Pacific, the Texas-New Mexico, and the Texas & Pacific, reduced their rates from Fort Worth, Tex., and origins west thereof which are involved herein, on traffic exported through Corpus Christi, to not exceed those on corresponding traffic exported through Galveston, Houston, and New Orleans. In consideration of a motion filed in behalf of the complainants, those four carriers were dismissed as party defendants by order dated September 11, 1964. Also, effective October 28, 1964, many of the assailed rates were revised so that they now are 5 cents higher to Corpus Christi than the corresponding rates to Houston and Galveston. Representative rates from points in the involved origin territory are shown in the appendix attached hereto.

The port of Corpus Christi has 500,000 square feet of sheds at shipside available for handling export shipments of cotton, and there are about 25 miles of railroad track in the port area. This port is served by the Southern Pacific, the Missouri Pacific, and the Texas Mexican, and by about 157 steamship lines. About 42 of the latter carry cotton in regularly scheduled service. In 1962, there were 1,200 deep sea sailing departures registered from this port.

The origin area involved in these proceedings is the source of approximately 25 percent of all the cotton produced within the United States. The 2-year average production, 1962-63, was as follows:

Northern Texas	3,123,753	bales.
Oklahoma	278,858	bales.
Eastern New Mexico	199,430	bales.
Total	3,602,041	bales.

The production in northern Texas is about 80 percent of the State's total, more than 50 percent of the latter being grown in the 10 counties of which Lubbock is the hub.

For the last 5 or 6 years, the ports of Galveston and Houston, respectively, had average yearly receipts of cotton of 1,990,469 and 1,393,679 bales, of which 1,491,220 and 909,396 bales were exported. At the port of Corpus Christi during the last 4 years, the average yearly export of cotton was 366,995 bales, of which an average of 110,944 bales came from the origin area described herein. Of the total unmanufactured cotton exported from these ports, Galveston, Corpus Christi, and Houston, respectively, handled 58, 9, and 33 percent in 1960, 56, 12, and 32 percent in 1962, and (based on incomplete figures) 49, 17, and 34 percent in 1963. During the last 4 years, the average amount exported from each port was 1,719,239, 366,995, and 1,019,929 bales which amounted to 55.4, 11.8, and 32.8 percent of the total. Gulf Compress receives and handles cotton at Corpus Christi. It has about 35 acres of floorspace and can store approximately 220,000 bales of flat cotton at one time. It is located about 2 miles from the docks, and it drays cotton to the public wharves. During the last five seasons, Gulf Compress had total receipts of cotton, as follows:

Season	From complaint area	From other origins
	Bales	
1959-60	16,742	191,865
1960-61	113,411	197,910
1961-62	65,529	203,673
1962-63	152,596	203,480
1963-64	44,438	166,913
Total	392,716	963,841

Of the tonnage originating in the complaint area 7,944 bales moved via rail in 1959, 4,750 bales moved via rail in 1960, and 4,875 bales moved via rail in 1961. Since that time all movements from the complaint area have been by truck.

The rates on cotton reflect an intrastate scale extended to interstate commerce, as adjusted under the general increase proceedings and to meet motor carrier competition. The defendants contend that the motor carrier competition is not as intense at Corpus Christi as at Houston and Galveston. However, during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck. The evidence does not show how much cotton moved from the involved origin area by rail or truck to Galveston and Houston, but the average receipts during the last four seasons from all origins to Galveston and Houston were as follows:

	Galveston	Houston
By truck (bales)	445,911	268,709
By rail (bales)	1,471,292	964,858
Percent by truck	30.3	27.8

From the Fort Worth and Denver Railway origins in Texas, some of the major rail and motor movements in 1963, in bales, were as follows:

From	To — Houston		Galveston		Corpus Christi	
	Rail	Truck	Rail	Truck	Rail	Truck
Memphis	17,861	4,663	39,666	9,965	0	2,543
Plainview	18,765	2,443	40,865	21,148	0	12,127
Childress	3,411	411	23,974	1,665	0	0
Lubbock	77,057	8,611	48,875	51,594	0	90,949

There is motor carrier competition for the cotton traffic from origins in the considered area to Corpus Christi. It is not possible on this record to compare the intensity of such competition with that at Houston and Galveston, since the record does not show the entire motor carrier movement from the considered area to the latter two ports. The matter of relative intensity of motor carrier competition was considered in *Export Grain from Texas to Texas Points*, 319 I.C.C. 16, in which, at page 25, the following was quoted with approval from *Fargo Chamber of Commerce* v. *Akron, C. & Y. R. Co.*, 306 I.C.C. 407, 412:

Even if it is true, as alleged by the defendants, that there is less motor-carrier competition at Fargo than at the Twin Cities, the difference is in degree and does not afford justification for the maintenance of the prejudicial relation. See *Fargo Chamber of Commerce* v. *Ahnapee & W. Ry. Co.*, 300 I.C.C. 289.

The railroads have inaugurated a so-called truck allowance system[6] in connection with substituted truck service, which has the effect of reducing the rail rates in effect prior to September 17, 1963, by an average of 10 cents. The allowance has had the effect of attracting to rails the traffic which has been moving to Corpus Christi by truck, and since the rail rates to Galveston and Houston are lower, the rail shipments would tend to move to those ports rather than to Corpus Christi. We agree with the examiner that Corpus Christi cannot hope to grow in those circumstances.

The defendants which do not serve Corpus Christi directly, participate in joint rates and routes to that port, but refuse to establish the same rates thereto as to Houston and Galveston. They fear that some of their traffic may be diverted from the ports which they serve, and on such traffic they would receive only a division of the through rates. If equal rates are required at the three Texas ports, these defendants will consider this factor before they establish motor competitive rates at the ports they serve. The ports of Galveston and Houston have adequate facilities to handle this cotton traffic and fear that if equal rates are established, some of their cotton traffic will be diverted to Corpus Christi. However, as stated in *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 291 I.C.C. 459, at page 467, neither possible or probable diversion of traffic from, nor the adequacy of existing facilities at, ports presently

[6] Under investigation in I. and S. Docket No. 8008, Allowances for Trucking Baled Cotton, Ark., Okla., Texas, embracing also I. and S. Docket No. 8008 (Sub-No. 1), Allowances for Trucking Baled Cotton, Kans., N. Mex., Okla., Tex.; Docket Nos. 34326, Trucking Allowances on Baled Cotton, Ark., Okla., Texas; 34326 (Sub-No. 1), Substituted Truck Service Allowance on Cotton, Okla. & Texas; and 34326 (Sub-No. 2), Allowances for Trucking Cotton, Kans., N. Mex., Okla., and Texas.

handling the traffic are valid reasons for denying another port an opportunity to share in the business if it can induce shippers to use its facilities.

The examiner found that no evidence had been offered tending to show that the assailed rates exceed a reasonable maximum level. Complainants excepted to this conclusion. As complainants point out, there was a comparison made of the assailed rates with the lower export rates to the other ports. However, these compared rates were voluntarily established, have been in effect for some time, and are admittedly compensatory. The compared rates, as previously noted, are on a motor competitive level. Thus, they are not a proper yardstick to determine maximum reasonableness. *Keokuk Electro-Metals Co.* v. *Chicago & N.W. Ry. Co.*, 301 I.C.C. 55-57. We agree with the examiner that the evidence in this proceeding will not support a finding that the assailed rates exceed a just and reasonable level.

In connection with the complainants' allegation of undue preference and prejudice, as stated, they have included the port of New Orleans. The examiner concluded that New Orleans is not competitive with Corpus Christi for the considered export cotton traffic. The complainants urge on exceptions that since New Orleans has the same rates as Corpus Christi from some of the origins, and since shipments do move to New Orleans, the examiner's finding was in error. The evidence of movement referred to in the exceptions covers one shipment trucked to New Orleans just before a maritime strike, because there was not enough time to bring the shipment to Corpus Christi. We agree with the examiner that such evidence does not establish that the port of New Orleans is competitive with Corpus Christi for the considered cotton traffic.

Corpus Christi cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston. The question is whether Corpus Christi's disadvantage amounts to un-

due prejudice, or, in other words, whether the higher rates to Corpus Christi and the lower rates to Houston and Galveston apply under substantially similar transportation circumstances. As previously noted, there is motor carrier competition on traffic to Corpus Christi. The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston. The existence of special facts justifying an inequity of treatment is a matter of defense to be proven by satisfactory evidence. See *Cudahy Packing Co.* v. *Akron C. & Y. R. Co.*, 318 I.C.C. 229, 245, affirmed *sub nom, Atchison, T. & S. F. Ry. Co.* v. *United States,* 218 F. Supp. 359.

The defendants refer to slower service from the considered origins to Corpus Christi than to Houston-Galveston. From Lubbock, for instance, the Atchison, Topeka & Santa Fe has single-line service to Houston and Galveston and offers second morning delivery, whereas to Corpus Christi it must interchange with another railroad, and the schedule calls for third morning delivery. Furthermore, the destination carriers at Corpus Christi divert a large percentage of the empty cars instead of returning them. These practices of the defendants, of themselves, however, do not warrant a rate inequity at the ports.

The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galveston, the distance from each origin to Corpus Christi is longer than to the other two ports. The examiner concluded that the best measure of the overall difference in the distances was a percentage comparison of the short-line rail distances from 19 selected origins[7] in the principal production area, which he considered to be representative, to Galveston and Corpus Christi. He computed those average distances to be 557.7 miles to Galveston and 636.2 miles to Corpus Christi, the latter being 14 percent longer. All of the parties filing

[7] Roswell and Lovington, N. Mex., and El Paso, Gainesville, Hamlin, Lamesa, Lubbock, Plainview, Seagraves, Sudan, Sweetwater, Childress, Chillicothe, Clarendon, Wichita Falls, Stanford, Abilene, Midland, and Pecos, Tex.

exceptions object either to the conclusion or to the selection of representative points. The complainants urge that the differences in distance be measured by the use of average distances from the origin counties in which the cotton was ginned, weighted to reflect the average number of bales ginned in such county, while the defendants argue that the distances over present tariff routes should be used. The Houston port interests support the use of the short-line distances from all points, and the Galveston port interests, the docket No. 28300[8] distances from the county seats. The average weighted distances from origins in New Mexico, Oklahoma, and Texas, respectively, are 796, 516, and 581 miles to Galveston, and 811, 613, and 648 miles to Corpus Christi. Other distances from representative points in Texas are shown in the following table:

		To—		
From—		Houston, Tex.	Galveston, Tex.	Corpus Christi, Tex.
		Miles	Miles	Miles
Childress	(1)	479.6	528	629
	(2)	480	480	622
	(3)	501.5	553.7	658.1 to 741.7
Lubbock	(1)	533.7	579	646
	(2)	525	525	646
	(4)	574	579	699.6 to 704.6
Plainview	(1)	580.5	626	693
	(2)	572	572	693
	(4)	621	626	746.6 to 751.6
Wichita Falls	(1)	373.4	422	523
	(2)	374	374	515
	(3)	395.3	447.5	551.9 to 635.7

(1) Short-line distances.

(2) Docket No. 28300 distances.

(3) Fort Worth and Denver Railway direct to Houston and Galveston, and in connection with other carriers to Corpus Christi.

(4) Santa Fe lines direct to Houston and Galveston, and in connection with other lines to Corpus Christi.

[8] *Class Rates Investigation, 1939*, 262 I.C.C. 447, and supplemental reports.

We have used distances on different bases as determinative of particular issues, depending upon the evidence presented and the intended use of the distances. In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances. See *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691, affirmed *per curiam, sub nom, Alabama, T. & N. R. Co.* v. *United States*, 207 F. Supp. 638. In the instant proceedings, the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston. Omitting the origins in southeastern Oklahoma and northeastern Texas, hereinafter considered, the docket No. 28300 distances from the other origins from which different rates are still maintained to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls. Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports, *Export Grain from Texas to Texas Points, supra, Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155, and *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co., supra*, and equal rates have been required. No different conclusion is warranted in the instant proceedings. Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi. The assailed rates appear to exercise so drastic an influence as to require port equalization.

The examiner found that the rates assailed are unduly prejudicial to the port of Corpus Christi and unduly preferential of Galveston and Houston, as in the proceedings cited next above. However, as noted, the complaints have been dismissed as to the Texas & Pacific and three other railroads upon the request of the complainants, although such railroads did not equalize their rates from stations

east of Fort Worth to Corpus Christi with those to Houston and Galveston. Dallas, Denton, and Marshall, Tex., are in this group, and, as noted in the appendix, the rates are higher to Corpus Christi than to the other two ports. The complainants have indicated that the action of the Texas & Pacific satisfied the complaints. Numerous origins on the Texas & Pacific east of Fort Worth are also served by other defendants, and no reason appears for requiring the other defendants to establish equal rates from these points to the three Texas ports. Moreover, the principal production of cotton in Oklahoma is shown to be in the western part, only two counties, Bryan (Durant, Okla.) and Muskogee, having any substantial production in the eastern part. Bryan County is a part of the same production area as the Texas origins east of Fort Worth, and should be treated the same ratewise. Traffic from Muskogee County to Corpus Christi could be transported through the eastern Texas and Bryan County production area, and rates to Corpus Christi on the Houston-Galveston level could cause higher rates to intermediate than to more distant points over the same line or route. Thus, the defendants will be expected to grade their rates to avoid violating the fourth-section principles.

The examiner found that the transit arrangements in connection with the assailed rates are less favorable to Corpus Christi than to Galveston and Houston, and that Corpus Christi was therefore unduly prejudiced in that respect also. However, the evidence indicates that there is now substantial equality in the transit services permitted on export cotton over existing routes to the gulf ports. The existing arrangements should be continued in connection with the rates required herein.

We find that the assailed rates on export cotton from origins in New Mexico on and east of the line of the Santa Fe Railway system extending from El Paso, Tex., to Trinidad, Colo., those in Texas on and north of the line of the Texas and Pacific Railway Company from El Paso to Fort Worth, Tex., and on and west of the Gulf, Colorado and

Santa Fe Railway from Fort Worth to Thackerville, Okla., and those in Oklahoma, except in Bryan County, to the port of Corpus Christi, Tex., are and for the future will be, unduly prejudicial to that port and unduly preferential of the ports of Houston and Galveston, Tex., to the extent that the rates to Corpus Christi exceed the corresponding rates to the latter ports.

COMMISSIONER FREAS, dissenting in part:

I disagree with the finding of undue preference and prejudice. To support such a finding it must be established that transportation conditions at the allegedly preferred and prejudiced points are substantially similar. As I see it, they are not.

It is ordered, That the defendants named in the complaints, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before July 26, 1965, and thereafter to abstain, from practicing the undue prejudice and preference found herein to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before July 26, 1965, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX

*Representative rail export rates on cotton in effect October 29, 1964, with the docket No. 28300 distances**

From—	To— Corpus Christi, Tex.				To— Houston-Galveston, Tex.			
	Distance	Col. 1	Col. 2	Col. 3	Distance	Col. 1	Col. 2	Col. 3
	Miles	Cents	Cents	Cents	Miles	Cents	Cents	Cents
New Mexico:								
Clovis	735	111	100	92	614	99	89	80
Carlsbad	735	117	107	99	614	105	93	85
Las Cruces	800	111	100	92	860	111	100	92
Lovington	710	102	91	83	589	102	91	83
Portales	735	111	100	92	614	99	89	80
Roswell	735	117	107	99	637	105	93	85
Oklahoma:								
Altus	592	116	105	98	451	80	69	59.5
Durant	499	107	96	88	336	70	59.5	52.5
El Reno	611	116	105	98	470	80	69	59.5
Guthrie	638	116	105	98	479	90	79	70
Muskogee	636	116	105	98	473	80	69	59.5
Tulsa	682	121	110	103	518	90	79	70
Texas:								
Abilene	500	(1) 75	64.5	57.5	379	70	59.5	52.5
		(2) 70	59.5	52.5		70	59.5	52.5
Childress	622	84.5	73.5	63.5	480	79.5	68.5	58.5
Dallas	415	(2) 76	67	57.5	261	54.5	44.5	38.5
		(1) 59.5	49.5	43.5		54.5	44.5	38.5
Denton	437	63.5	55.5	46.5	281	58.5	50.5	41.5
Dimmit	736	90.5	79.5	69.5	615	85.5	74.5	64.5

From—	To Corpus Christi, Tex. Distance	Col. 1	Col. 2	Col. 3	To Houston-Galveston, Tex. Distance	Col. 1	Col. 2	Col. 3
	Miles	Cents	Cents	Cents	Miles	Cents	Cents	Cents
El Paso ..	756	111	100	92	816	111	100	92
Fort Worth	415 (1)	59.5	49.5	43.5	261	54.5	44.5	38.5
	(2)	54.5	44.5	38.5		54.5	44.5	38.5
Lamesa ..	678	84.5	73.5	63.5	561	79.5	68.5	58.5
Littlefield	683	84.5	73.5	63.5	561	79.5	68.5	58.5
Lubbock .	646	84.5	73.5	63.5	525	79.5	68.5	58.5
Marshall ..	462	80	69	59.5	255	54.5	44.5	38.5
Pecos	729 (2)	97	85	77	608	97	85	77
	(3)	108	98	90		105	93	85
Sherman ..	470	68.5	59.5	49.5	307	63.5	54.5	44.5
Seymour ..	567	75	64.5	57.5	426	70	59.5	52.5
Sweetwater	530 (1)	76	65.5	58.5	409	71	60.5	53.5
	(2)	71	60.5	53.5		71	60.5	53.5
Wichita Falls	515	75	64.5	57.5	374	70	59.5	52.5

Col. 1—Minimum 25,000 pounds.

Col. 2—Minimum 50,000 pounds.

Col. 3—Minimum 65,000 pounds.

(1) Defendants other than Texas & Pacific and associated lines.

(2) Texas & Pacific and associated lines.

(3) Panhandle & Santa Fe only.

* *Class Rate Investigation, 1939,* 262 I.C.C. 447, and later reports.

APPENDIX D — page 1

STATEMENT SHOWING RELATIVE LEVELS OF THE EXPORT RATES ON COTTON (MIN. WT. 50,000 POUNDS) FROM REPRESENTATIVE POINTS IN THE INVOLVED ORIGIN TERRITORY TO CORPUS CHRISTI, HOUSTON, AND GALVESTON.[1]

	TO CORPUS CHRISTI			TO GALVESTON-HOUSTON			PERCENTAGE RELATION OF CORPUS CHRISTI TO GALVESTON-HOUSTON		
FROM (1)	Distance (Miles) (2)	First Class Rate (Cents) (3)	Export Cotton Rate (Cents) (4)	Distance (Miles) (5)	First Class Rate (Cents) (6)	Export Cotton Rate (Cents) (7)	Distance (%)[2] (8)	First Class Rate (%)[3] (9)	Export Cotton Rate (%)[4] (10)
TEXAS:									
Abilene	500	323	64.5	379	280	59.5	132	115	108
Childress	622	370	73.5	480	316	68.5	130	117	107
Dimmit	736	405	79.5	615	363	74.5	120	112	107
El Paso	756	411	100.0	816	432	100.0	93	95	100
Fort Worth	415	296	49.5	261	242	44.5	159	122	111
Lamesa	678	384	73.5	561	350	68.5	121	110	107
Littlefield	683	391	73.5	561	350	68.5	122	112	107
Lubbock	646	378	73.5	525	337	68.5	123	112	107
Pecos	729	405	98.0	608	363	93.0	120	112	105
Seymour	567	350	64.5	426	302	59.5	133	116	108
Sweetwater	530	337	65.5	409	296	60.5	130	114	108
Wichita Falls	515	328	64.5	374	280	59.5	138	117	108
AVERAGE	615	365	73.2	501	326	68.8	127	113	107
NEW MEXICO:									
Clovis[5]	735	405	94.0	614	363	89.0	120	112	106
Carlsbad[5]	735	405	98.0	614	363	93.0	120	112	105
Las Cruces	800	426	100.0	860	447	100.0	93	95	100
Lovington	710	399	91.0	589	356	91.0	121	112	100
Portales[5]	735	405	94.0	614	363	89.0	120	112	106
Roswell[5]	735	405	98.0	637	370	93.0	115	109	105
AVERAGE	742	408	95.8	655	377	92.5	115	109	104
OKLAHOMA:									
Altus	592	356	105.0	451	308	69.0	131	116	152
El Reno	611	363	105.0	470	316	69.0	130	115	152
Guthrie	638	370	105.0	479	323	79.0	133	115	133
Muskogee	636	370	105.0	473	316	69.0	134	117	152
Tulsa	682	391	110.0	518	328	79.0	132	119	139
AVERAGE	632	370	106.0	478	318	73.0	132	116	146

APPENDIX D — page 2

STATEMENT SHOWING RELATIVE LEVELS OF THE EXPORT RATES ON COTTON (MIN. WT. 65,000 POUNDS) FROM REPRESENTATIVE POINTS IN THE INVOLVED ORIGIN TERRITORY TO CORPUS CHRISTI, HOUSTON, AND GALVESTON.[1]

	TO CORPUS CHRISTI			TO GALVESTON-HOUSTON			PERCENTAGE RELATION OF CORPUS CHRISTI TO GALVESTON-HOUSTON		
FROM	Distance (Miles)	First Class Rate (Cents)	Export Cotton Rate (Cents)	Distance (Miles)	First Class Rate (Cents)	Export Cotton Rate (Cents)	Distance (%)[2]	First Class Rate (%)[3]	Export Cotton Rate (%)[4]
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
TEXAS:									
Abilene	500	323	57.5	379	280	52.5	132	115	110
Childress	622	370	63.5	480	316	58.5	130	117	109
Dimmit	736	405	69.5	615	363	64.5	120	112	108
El Paso	756	411	92.0	816	432	92.0	93	95	100
Fort Worth	415	296	43.5	261	242	38.5	159	122	113
Lamesa	678	384	63.5	561	350	58.5	121	110	109
Littlefield	683	391	63.5	561	350	58.5	122	112	109
Lubbock	646	378	63.5	525	337	58.5	123	112	109
Pecos	729	405	90.0	608	363	85.0	120	112	106
Seymour	567	350	57.5	426	302	52.5	133	116	110
Sweetwater	530	337	58.5	409	296	53.5	130	114	109
Wichita Falls	515	328	57.5	374	280	52.5	138	117	110
AVERAGE	615	365	65.0	501	326	60.4	127	113	109
NEW MEXICO:									
Clovis[5]	735	405	85.0	614	363	80.0	120	112	106
Carlsbad[5]	735	405	90.0	614	363	85.0	120	112	106
Las Cruces	800	426	92.0	860	447	92.0	93	95	100
Lovington	710	399	83.0	589	356	83.0	121	112	100
Portales[5]	735	405	85.0	614	363	80.0	120	112	106
Roswell[5]	735	405	90.0	637	370	85.0	115	109	106
AVERAGE	742	408	87.5	655	377	84.2	115	109	104
OKLAHOMA:									
Altus	592	356	98.0	451	308	59.5	131	116	165
El Reno	611	363	98.0	470	316	59.5	130	115	165
Guthrie	638	370	98.0	479	323	70.0	133	115	140
Muskogee	636	370	98.0	473	316	59.5	134	117	165
Tulsa	682	391	103.0	518	328	70.0	132	119	147
AVERAGE	632	370	99.0	478	318	63.7	132	116	156

NOTES:

[1] Source of basic data: Cols. (3) and (6) are taken from exhibits (c), (d), and (e) to the verified statement of W. E. Fincher. All other basic data are from the appendix to the Commission's report. The rates maintained by the Texas & Pacific and associated lines are not shown for the reason that those carriers were dismissed as defendants by order dated September 11, 1964, and their rates are no longer at issue in the case. Dallas, Denton, Marshall, and Sherman, Tex., and Durant, Okla., have been eliminated as origins for the reason that the Commission did not require equalization of the rates from such origins. (See App. C, pp. 23-25)

[2] Col. (2) divided by Col. (5).

[3] Col. (3) divided by Col. (6).

[4] Col. (4) divided by Col. (7).

[5] Effective March 27, 1965, the export cotton rates from these stations to Corpus Christi were voluntarily reduced to be 5 cents over the corresponding rates to Galveston-Houston.